FILED
JUL 12 1971
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1970

No. 71-62

RAMIRO RUBEN RAMIREZ, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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Bank Bldg., El Paso, Tex.
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IN THE SUPREME COURT OF
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No.

RAMIRO RUBEN RAMIREZ, Petitioner
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Ramiro Ruben Ramirez, petitions for a writ of certiorari to reveiw the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on the 29th day of April, 1971 with rehearing denied on June 22, 1971. A co-appellant's conviction in the court below was reversed and neither she nor the government have petitioned for a writ of certiorari.

OPINION BELOW

The opinion of the court of appeals (App. A, pp. 19-27 , infra) and its opinion

denying rehearing en banc (App. B, pp. 28, 29 infra) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, infra, p. 30, 31,) was entered on April 29, 1971. A petition for rehearing En Banc (App. B, infra, p. 28, 29) was denied on June 22, 1971. The mandate as to petitioner Ramirez issued June 30, 1971. The jurisdiction of this Court is involved under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether HARRIS v NEW YORK __U.S. __decided February 24, 1971, has overruled the ruling in MIRANDA v ARIZONA 384 U.S. 436, (1966) that " the prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation" in that the Fifth Circuit on the authority of the HARRIS case held that once petitioner elected to testify, the government may show he remained silent as an inconsistent act at the time of his arrest and thereafter, notwithstanding the Fifth and Sixth Amendments.[1]

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted for dealing in heroin contrary to 21 U.S.C. §174. He was sentenced to imprisonment for fifteen years.

---

1. See page 16, infra.

The court of appeals reversed the conviction of a co-defendant, Evangelina Lopez Hernandez, on the insufficiency of the evidence. Hernandez is not a petitioner herein.

During its cross-examination of petitioner, the prosecution established that he was arrested on September 12, 1970 and remained in the presence of the police officers until he was released on bail about 20 days thereafter. (Tr. 347-348) Then the government inquired of petitioner whether he had chosen to remain silent at the time of his arrest and thereafter in regards to his defense of coercion with the following questions:

> Q: All right, and you didn't tell a single one of those men (police officers) this story that you have told from the witness stand this morning, did you?
>
> A: At that moment (of arrest), I didn't think so.
>
> Q. In fact, you never have told that story to any officer, that you told on the stand today?
>
> A: No.

The prosecutor in his jury argument commented upon the proof that Ramirez had chosen to remain silent at the time of his arrest. (Tr. 440-441, 484-485). The prosecutor argued, as follows, at p. 441:

"Jim Johnson, the Deputy Marshal, put the handcruffs on him (Ramirez). And he didn't say anything about 'my family may be in danger'. He didn't tell Bill Bessent or Mr. Bartlett, the Customs Agent, 'my family may be in danger' . He didn't tell anybody that until he took the stand this morning. Now does that comport with reason? If anybody had been in danger, do you think for one minute he wouldn't have told it then? "

Then at page 484, the prosecutor said:

" I can in return ask one question that defeats the entire speculation of coercion, and that question is this: listen to this: if he was so afraid of these people in Juarez, why, why in the world is he telling you the story now that he has got a wife and he has got a family, if he is afraid? Why is he telling the story now? With the newspaper reporter in the back of the room, and this is a public trial. He is telling the story, people, because it is a total fabrication."

The court of appeals concluded that petitioner's silence at the time of arrest and thereafter was not excludable from the jury's consideration once he elected to testify and asserted the defense of coercion in light of HARRIS v NEW YORK, _____U.S._____ (1971). It reasoned that silence at the time of arrest and thereafter are inconsistent acts and cross-examination of petitioner concerning his silence falls within the ambit of HARRIS v NEW YORK, supra.

ARGUMENT

The decision below holds that once a defendant elects to testify and asserts a defense, the prosecution has a right to show his prior inconsistent act of remaining silent at the time of his arrest. In holding that a defendant's silence at the time of arrest and thereafter is not excludable from jury consideration by MIRANDA v ARIZONA 384 U.S. 436 (1966) the court of appeals has decided an important question in a manner contrary to the decisions of this Court and of other courts of appeals and this important question of constitutional law should be settled by this Court. The problem created by the court's ruling is acute to all attorneys in the United States because a lawyer's "sole duty is to protect his client --guilty or innocent --and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." WATTS v INDIANA, 338 U.S. 49, 59 (1948). See GILLISON v UNITED STATES, D.C. 1968, 399 F. 2d 586.

The principal that all attorneys, appointed or retained, can, in good faith without fear that their advice will be used against their client, " tell the suspect in no uncertain terms to make no statement to police under any circumstance" is at stake here. Counsel ought to be able to advise his client to remain silent at the time of arrest and thereafter no matter what defense is asserted by the client from the

witness stand. In this view, the instant case is, we believe, a case of extreme significance to the effectiveness of counsel in all criminal cases as a whole. The advice to remain silent is perhaps the most important advice an attorney can give and a failure to do so might support a charge of ineffective counsel. Indeed, in those cases where counsel advises a suspect to assert his defense to the police, prosecutors will be in a position to ask the jury to consider that the suspect asserted the defense after consulting with counsel in light of the lower court's ruling in the case at bar. Certainly there is no waiver of the Fifth and Sixth Amendments right to remain silent at the time of arrest and to counsel where a defendant has the temerity to testify in his own defense.

The situation here is manifestly different from that in HARRIS v NEW YORK, ___ U.S. ___ (decided February 24, 1971) relied on by the Court below (App. A, infra, p. 26) where it was held statements obtained without MIRANDA warnings could be admitted for the purpose of impeachment. In likening the present case to the HARRIS case the Court of Appeals made the critical error of treating a prior statement and prior silence as the same. Furthermore, silence is not perjury. Certainly, as is the law, if a person at the time of arrest and thereafter may stand mute and refuse to answer any question, it is most incongruous if he cannot thereafter take the stand and assert a defense without fear of cross-examination on his original silence and comment by the prosecutor in jury argument on said silence.

The opinion below is in conflict with MIRANDA v ARIZONA, 384 U.S. 436 (1966) where this Court explicitly barred the use of a defendant's silence against him and HARRIS v. NEW YORK, supra, did not overrule this rule. Chief Justice Warren tells as follows: (384 U.S. at 468-469)

> " At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. * * * It is not just the subnormal or woefully ignorant who succomb to an interrogator's impracations whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury." (emphasis added)

Footnote 37, in part, follows:

> " In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation". (Emphasis added)

This court condemned the practice by police of telling an accused that there is an incriminating significance in a refusal to talk. MIRANDA at p. 712.

If this Court denies certiorari herein, then it will be appropriate for prosecutors in federal and state courts in reliance upon the opinion below, to penalize a defendant when he exercises his right to testify in his own defense by showing to the jury that he exercised his Fifth and Sixth Amendment rights to remain silent and to counsel at the time of arrest. This situation will cause a great deal of litigation and conflict between courts of appeal and in the event, this Court rules for petitioner's contentions in another case at a later date, then the question of retroactivity will raise its ugly head.

Indeed the opinion below will support not only an implication of an inconsistent act or perjury from silence at the time of arrest, but the fact of said silence will be nothing more than competent evidence as tending to establish guilt as well as to impeach once a defendant elects to testify. If the learned judges in the opinion below have deduced the conclusion that silence at the time of arrest is so weighty when a defendant elects to testify as to create an inference of perjury or creats an inconsistent act so as to impeach, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something when informed by

one in authority that in the event of a trial should he elect to testify and assert a defense that the prosecution has the right to show to the jury his inconsistent act of remaining silent, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him , or of hope that if he did reply he would be benefited thereby. Under this state of the law, neither a statement nor silence would be made by one who in law could be considered a free agent. Either silence or a statement would be involuntary.

The opinion below is in conflict with decisions of other federal courts of appeals and state courts as to the critical question whether silence or request for counsel on arrest can be used for impeachment or as a "tacit admission" of guilt." When one takes the stand in his own defense, he of course puts his credibility as a witness in issue. Nevertheless we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment. In the first place such evidence is ambiguous. Fagunde's words when arrested can as well be taken as indicating reliance upon constitutional rights as supporting an inference that his alibi was an afterthought. * * * In the second place we think it reversible error to permit a jury to draw any inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice

of counsel ". FAGUNDES v UNITED STATES, 1 Cir. 1965, 340 F. 2d 673, 677; FOWLE v UNITED STATES, 9 Cir. 1969, 410 F. 2d 48; UNITED STATES v BRINSON, 6 Cir. 1969, 411 F. 2d 1057, considered plain error; UNITED STATES v PICCIOLI, 2 Cir. 1965, 352 F. 2d 856; UNITED STATES v GROSS, 2 Cir. 1960, 276 F. 2d 816; SPECTOR v UNITED STATES, 9 Cir. 1952, 193 F. 2d 1002, bond hearing appeal, UNITED STATES vTOMAIOLO, 2 Cir. 1957, 249 F. 2d 683, 690-692, improper to impeach witness; HUNT v COX, E. D. Va. 1970, 312 F. Supp. 637, state prisoner's writ of habeas corpus granted; STATE v HESTER, 137 S. Ct. 145, 185, 134 S. E. 885, 898-899; STATE v DOWLING, 1941, 348 Mo. 589, 599, 1154 S. W. 2d 749, 755; PHELIN v KINDERLINE, 120 Pa. 354, 363. See UNITED STATES v. FOSTER, 4 Cir. 1962, 309 F. 2d 8 UNITED STATES v McKINNEY, 6 Cir. 1967, 379 F. 2d 259; McCARTHY v UNITED STATES, 6 Cir. 1928, 25 F. 2d 298, and the Fifth Circuit in HELTON v UNITED STATES, 5 Cir. 1955, 221 F. 2d 338, 342, said:

> " Under our law, it is not the function of police officers to determine for the benefit of the jury whether or not a person under arrest on suspicion of crime has given a sufficient explanation or any explanation at all and the fact that the accused here remained silent rather than risk unwitting distortion of his statement by a police officer at a later date does

not give in law, and should not be allowed to give in fact, rise to an inference of guilt."
(Emphasis added)

" For years and years the members of the bar have cautioned their clients not to discuss their cases with those with whom they came in contact, unless absolutely assured of their friendship and many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has become a well-known fact to our people generally". STATE v HESTER, supra.

It is also clear that testimony which is elicited to establish that a defendant claimed the privilege against self-incrimination before a grand jury or at a former trial is inadmissible. GRUNEWALD v UNITED STATES, 353 U.S. 391 (1957). STEWART v UNITED STATES, 366 U.S. 1 (1961).

The theory of the court of appeals below would require the warning of MIRANDA supra, to read: " You have a right to remain silent, that any statement you do make may be used as evidence against you and that you have a right to presence of an attorney, either retained or appointed, but if you remain silent now or hereafter, or take the advice of counsel to remain silent, and then elect to testify in your own defense, your silence will then be used against you ". See

McCARTHY v UNITED STATES, 6 Cir. 1928, 25 F. 2d 298 at 299. If the above warning is now the law, then counsel will be forced to make split second decisions upon slim facts as to whether a client who calls counsel to the police station should assert a Fifth Amendment right or assert their defense immediately.

Either choice may result in the impeachment of the client before the jury. Where the privilege is claimed the lower court in the case at bar will assume that silence is perjury. This should not be the law and is not the law. Justice Frankfurther in ULLMAN v UNITED STATES, 350 U.S. 422 (1955) wrote as follows:

> " They too readily assume that those who invoke it (Fifth Amendment) are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. * * * The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty and we have been admonished that it should be given liberal application." (Emphasis added)

And Justice Clark in SLOCHOWER v. BOARD OF EDUCATION, 350 U.S. 551 (1955) tells:

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment * * * The privilege against self-incrimination would be reduced to a hollow mockery if its exercises could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury * * *: It matters not whether the plea (Fifth Amendment) resulted from mistake, inadvertance, or legal advice conscientiously given, whether wisely or unwisely * * * since no inference of guilt was possible from the claim * * *".

And footnote 14 in STEWART v UNITED STATES, 366 U.S. 1 explains the GRUNEWALD case with these words:

> " Since defendant's testimony placed his credibility in issue, the necessary implication of that holding is that his prior refusal to testify could not be used to impeach his general credibility."

The issue here is not whether the government's cross-examination on silence at the time of arrest is the only way for the government to disprove coercion or whether the subject matter is relevant and material, but rather if such cross-examination violates

constitutional safe-guards and rights. However, silence at time of arrest and thereafter is ambiguous for " the privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances ". SLOCHOWER v BOARD OF EDUCATION, supra. Therefore, silence at time of arrest and thereafter is ambiguous and the lower court erred in holding such was a prior inconsistent act for jury consideration.

The government would make a rule that a defendant could testify to a defense only by assuming the risk that upon cross-examination or by other evidence the jury would be shown that the defendant failed to assert his defense at the time of arrest and thereafter. This dilemma presents a Hobson's choice. It is obvious that a defendant who knows that his silence at time of arrest will be admissible against him at trial will sometimes be deterred from presenting his own testimonial proof of a defense.

This rule will impose upon a defendant an unconstitutional condition which may deter him from asserting his Fifth and Sixth Amendment rights at the time of arrest and thereafter. The government's justification for this new rule is that the defendant has a choice of refusing to testify and not waiving the right to remain silent after arrest, but by such a choice he gives up the benefit of his own testimony, or he can forego the benefits of silence upon arrest and the advice of counsel in order to testify to a defense without fear of jury

consideration of his silence and invocation of Fifth and Sixth Amendment rights as a prior inconsistent act and most probably as an act of guilt. No jury instruction could prevent otherwise. BRUNO v UNITED STATES 308 U.S. 287 (1939). See SIMMON v. UNITED STATES, 390 U.S. 377 (1968). It is intolerable that one constitutional right must be surrendered in order to assert another. SPEVACK v KLEIN 385 U.S. 511 (1967); GRIFFIN v CALIFORNIA, 380 U.S. 609 (1965).

Notwithstanding the failure to object in the trial court, the lower court of appeals has considered the issues herein and has made a new rule by mis-apprehending the teachings of HARRIS v NEW YORK, supra. In LEARY v. UNITED STATES, 395 U.S. 6 (1969) this Court held that " his failure to raise the issue (Fifth Amendment) at that time (the trial) did not amount to a waiver of privilege". See JOHNSON v ZERBST, 304 U.S. 458 (1938). A denial of certiorari herein will give a green light to prosecutors in light of the lower court's opinion to bring before juries for their consideration silence at the time of arrest. This will cause many appeals and cost the government thousands of dollars for appointed counsel on appeal and many retrials and writs of habeas corpus will be filed should this Court rule for petitioner's contention in another case at a later date.

The wording in part of the issue considered by the court below and which is in substance the same as presented herein, follows:

> "May the silence of Ramirez at the time of his arrest and thereafter, chosen in the exercise of his privilege against self-incrimination and the right to counsel, be constitutionally used against him by the prosecution if, during his trial, he testifies in his own defense * * *".

Now is the time for this Court to give clear guidance to all lower courts, federal and state, to law enforcement officers, to prosecutors and to defense counsel, on the important issue presented herein. A clear cut decision now will save untold judicial time in the future and courts, defense counsel, and law enforcement need an answer in order to promote the fair administration of justice.

The rule that the silence of an accused at the time of arrest and thereafter can be used to impeach or to draw an inference of guilt will do untold harm to innocent persons. Certainly, the questions and jury argument of the prosecutor in the case at bar asked the jury to consider silence as an inference of guilt as well as evidence for impeachment. In this light, it is difficult to imagine a rule that will cause more confusion and uncertainty within the legal profession in the future. A whole new area of dispute will be opened. It is urged that this Court give the most serious consideration to the numerous problems

that courts will encounter on the proposition or principle that a defendant can be penalized for his silence upon arrest and thereafter. We therefore, urge this Court to review and reverse the decision below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JOHN L. FASHING, one of the attorneys for the petitioner Ramiro Ruben Ramirez, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 12th day of July, 1971 I served three copies of the foregoing petition for writ of certiorari each, on the following:

1. On Mr. Ralph Harris, Assistant U.S. Attorney for the Western District of Texas, El Paso Division, by mailing him three copies of the same at his offices, Federal Courthouse Building, El Paso, Texas 79901.

2. On the United States by mailing three copies thereof in a duly addressed envelope, with airmail postage prepaid to Honorable Erwin Griswold, United States Solicitor General, United States Department of Justice, Washington, D. C.

John L. Fashing

JOHN L. FASHING

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30511

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAMIRO RUBEN RAMIREZ and
EVANGELINA LOPEZ HERNANDEZ,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

(April 29, 1971)

Before SKELTON*, Judge, and MORGAN and CLARK, Circuit Judges.

MORGAN, Circuit Judge: Ramiro Ruben Ramirez and Evangelina Lopez Hernandez, brother and sister of the half-blood, appeal their conviction for dealing in heroin contrary to 21 U.S.C. §174. We affirm the conviction of Ramirez and reverse as to defendant Hernandez.

*Judge Byron G. Skelton, U.S. Court of Claims, sitting by designation.

In June of 1969, Billy Ray Bessent, working as an undercover agent for the narcotics section of the Texas Department of Public Safety, began a relationship with David Rowland, a known narcotics dealer and addict. Rowland introduced agent Bessent to several suppliers of narcotics over the State of Texas and in particular to an El Paso resident, defendant Ramiro Ramirez. Suspecting that Bessent was a police officer, Ramirez at first refused to talk or deal with the undercover agent. Instead, Ramirez sold five grams of heroin to Rowland who in turn resold the drug to agent Bessent.[1] However, in August of 1969, Ramirez finally agreed to sell heroin directly to Bessent, and the parties decided to meet and consummate the transaction at a house located at 362 Val Verde Street. This house was owned by Ramirez' mother who lived there along with Ramirez' brother, Mr. and Mrs. Hernandez, and the two Hernandez children.

As agent Bessent, accompanied by Rowland and Ramirez, entered the house on Val Verde, Mrs. Hernandez and her two children were sitting in the living room. The three men proceeded to the middle bedroom where Ramirez removed a small jar from a drawer and began slowly measuring the proper amount of heroin by scooping a spoonful of the powdered drug out of the jar, scraping the excess powder off the top of the spoon with a razor blade, and then emptying the leveled spoonful into a plastic bag. According to Ramirez, fifty level spoonsful would equal the two ounces for which

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[1]Rowland was tried jointly and convicted along with defendants Hernandez and Ramirez but he does not participate in this appeal.

Bessent had agreed to pay $1,100.00. While the measuring operation was in progress, agent Bessent counted the purchase money and placed it on a table. Ramirez thereupon called out something in Spanish and Mrs. Hernandez appeared at the bedroom door and, upon hearing more Spanish words, removed the money from the table and left the room. Not being conversant in the Spanish language, Bessent was unable to understand the content of the conversation between Ramirez and his half-sister.

On September 12, 1969, Ramirez again agreed to sell Bessent a large quantity of heroin. This sale took place behind an El Paso shopping center in Ramirez' 1965 Pontiac. When Ramirez produced the heroin from under the car seat, agent Bessent drew his pistol and arrested the defendant while several other police officers closed to provide assistance.

After the arrest of Ramirez, police officers obtained a search warrant and went to the house at 362 Val Verde Street where they found Mrs. Hernandez, her two children, and two relatives in the living room. A thorough search of the house was conducted, and in the middle bedroom officers discovered forty "papers"[2] of heroin inside the pocket of a brown work shirt which was hanging in the closet. Mrs. Hernandez was arrested and taken to the police station.

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[2]A "paper" of heroin is simply a small amount of the drug wrapped in a piece of paper and ready for sale to the addict as one "fix", or dosage, which the addict reduces to liquid form and injects into the bloodstream.

At the ensuing trial, the government charged Ramirez with three counts of selling, transporting, receiving, and concealing heroin, and with one count of conspiracy to commit these substantive offenses, all in violation of 21 U.S.C. §174. Mrs. Hernandez was charged with one count of concealing and transporting heroin, and with another count for conspiracy to import, receive, conceal and sell heroin, also in violation of 21 U.S.C. §174. Ramirez did not attempt to refute any of the factual allegations against him but, instead, raised the defense of coercion by claiming that he was selling heroin only because a group of men from Mexico had threatened him and his family with immediate harm if he refused to cooperate. On the other hand, Mrs. Hernandez denied any knowledge of heroin being concealed or sold in the house in which she lived. The jury believed neither defendant and returned a verdict of guilty on all counts. Ramirez received a sentence of 15 years on each count to be served concurrently and Hernandez received two concurrent sentences of 5 years each.

On this appeal Mrs. Hernandez contends her motion for acquittal at the close of the testimony should have been granted because the evidence before the jury was insufficient to support her conviction. The burden was, of course, on the government to prove the element of knowledge by showing that Mrs. Hernandez knew the substance concealed and sold in her home was heroin. See *Newsome* v. *United States*, 5 Cir., 1964, 335 F. 2d 237. Considering the evidence in the light most favorable to the jury's verdict; *Causey* v. *United States*, 5 Cir., 1965, 352 F. 2d 203, we find the government failed

to sustain its burden of proving knowledge as an element of the crime. A review of the record discloses that Mrs. Hernandez lived in the house at 362 Val Verde Street with her husband, her two children, her mother, and her brother, Roberto. On the day of the heroin sale, Mrs. Hernandez entered the middle bedroom while the drug was being measured and, after conversing in Spanish with Ramirez, picked up the $1,000.00 and left the room. When persons seeking to buy heroin called the Val Verde address and asked for Ramirez, Mrs. Hernandez summoned her brother to the telephone. After the arrest of Ramirez, a search of the Val Verde house revealed 40 "papers" of heroin concealed in the same middle bedroom where the initial sale had taken place.

Admittedly, a jury could reasonably infer from the foregoing circumstantial evidence that Mrs. Hernandez was an active participant in the heroin business, but the question is whether the jury could so infer to the exclusion of every other reasonable hypothesis. See *Roberts* v. *United States*, 5 Cir., 1969, 416 F. 2d 1216; *Harper* v. *United States*, 5 Cir., 1969, 405 F. 2d 185. We hold they could not. In the first instance, there was absolutely no testimony that Mrs. Hernandez would recognize heroin for what it was when she saw it. Prior to the transaction in the middle bedroom[3] there was no evidence that Mrs. Hernandez had ever seen, heard of or had any contact whatsoever with narcotic drugs. For all the record shows, Mrs. Hernandez would have had

[3]The middle bedroom was not the bedroom in which Mrs. Hernandez slept.

no reason to suspect anything illegal upon seeing a a small bottle containing a white powdery substance since, regrettably, heroin does not have distinctive identifiable qualities which would inform the uninitiate that criminal activity is afoot. The fact that Mrs. Hernandez received money and at the same time observed a substance later proved to be heroin does not of itself establish her complicity in the crime in the absence of some evidence that she knew or should have known a heroin transaction was taking place.

Neither does the additional proof that Mrs. Hernandez called Ramirez to the telephone when requested to do so by prospective heroin customers save the government's case. The customers merely asked to speak with Ramirez; the government made no attempt to show that a customer ever revealed the nature of his call to defendant Hernandez. Moreover, it would not seem unusual for Ramirez to receive at 362 Val Verde since his house, located two blocks away, did not have a telephone. As to the 40 "papers" of heroin seized from the middle bedroom, the record reveals nothing more than the fact that the contraband was discovered in a house where Hernandez and several other persons lived.

In summary, we hold that the evidence presented was insufficient to support a finding that Mrs. Hernandez knew that heroin was being transported, concealed or sold in the house in which she lived. The conviction of Hernandez on both counts is hereby reversed.

Defendant Ramirez, relying on *Miranda* v. *Arizona*,

1966, 384 U.S. 436, contends that plain error[4] was committed when the government cross-examined him about remaining silent during his arrest and thereafter. The colloquy began when Ramirez took the witness stand and told the jury that he was coerced into selling heroin by strangers from Mexico who kept himself and his family under constant threat of harm. Ramirez further testified that he desired to get caught so he would no longer be compelled to sell heroin. In an attempt to discredit the coercion defense, the government, on cross-examination, solicited the following testimony from Ramirez :(R. 349)

Question: "All right and you didn't tell a single one of those men (police officers) this story that you have told from the witness stand this morning, did you?

Answer: "At that moment I didn't think so.

Question: "In fact you never have told that story to any officer, that you told on the stand today?

Answer: "No."

In its closing argument, the government urged the jury to believe that Ramirez was lying since a man actually under duress and fearful for his family's safety would have informed the police of such a dangerous situation upon being apprehended.

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[4]None of the points of error raised by Ramirez on appeal were objected to by his trial counsel.

We reject the contention that Ramirez' silence is excludable from the jury's consideration by *Miranda* v. *Arizona*, supra, and hold that the cross-examination falls clearly within the ambit of *Harris* v. *New York*, 1971, ____ U.S. ____, 39 U.S.L.W. 4281. In *Harris* the court held that while *Miranda* might prevent the use of certain statements obtained without proper warnings in the prosecution's case in chief, such statements could be admitted for the purpose of impeaching the testimony of an accused who took the witness stand.

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 1969, 396 U.S. 77; cf. *Dennis* v. *United States*, 1966, 384 U.S. 855. Having voluntarily taken the stand petitioner was under an obligation to speak truthfully and accurately and the prosecution here did no more than utilize the traditional truth testing devices of the adversary process.
>
> "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of prior inconsistent utterances." *Harris* v. *New York*, supra, at ____.

The analogy of *Harris* to the case at hand is inescapable. Once Ramirez elected to testify and assert the defense of coercion he became subject to the "traditional truth-testing devices of the adversary process",

including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest. Thus, the district court was not in error in allowing the government to cross-examine Ramirez about his silence.

We have considered each of the several other contentions advanced by Ramirez and find them to be without merit. The conviction of Ramirez on all counts is therefore affirmed.

REVERSED IN PART; AFFIRMED IN PART.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30511

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAMIRO RUBEN RAMIREZ and
EVANGELINA LOPEZ HERNANDEZ,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion April 29, 1971, 5 Cir., 197____, ____ F.2d ____).

(June 22, 1971)

Before SKELTON*, Judge, and MORGAN and CLARK, Circuit Judges.

*Judge Byron G. Skelton, U.S. Court of Claims, sitting by designation.

PER CURIAM: The Petition for Rehearing on behalf of Ramiro Ruben Ramirez is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc on behalf of Ramiro Ruben Ramirez is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30511

D. C. Docket No. EP-70-CR-94

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

RAMIRO RUBEN RAMIREZ and
EVANGELINA LOPEZ HERNANDEZ,
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas

Before SKELTON*, Judge, and MORGAN and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counse;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part; and affirmed in part in accordance with the opinion of this Court.

April 29, 1971

Issued as Mandate: June 30, 1971

(As to Ramirez only)

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*Judge Byron G. Skelton, U.S. Court of Claims, sitting by designation

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No. 71-62

In the Supreme Court of the United States

OCTOBER TERM, 1971

RAMIRO RUBEN RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-62

RAMIRO RUBEN RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one conspiracy count and three substantive counts of an indictment charging him and others with selling heroin, in violation of 21 U.S.C. 174.[1] On

[1] Three others were charged in the indictment; the charges against one of the three, Jose Hinojosa, were dismissed prior to trial. The other two individuals, Rowland and Lopez-Hernandez, were tried with petitioner; each was found guilty on two counts. Lopez-Hernandez was sentenced to concurrent terms of five years on each count and appealed. Her conviction was reversed by the court below for insufficient evidence (Pet. App. 6). Rowland was sentenced to concurrent terms of ten years on each count. He did not appeal.

August 18, 1970, he was sentenced to imprisonment for fifteen years on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App.).

On June 20, 1969, one Bill Bessent, an undercover narcotics agent for the Texas Department of Public Safety, and co-defendant David Rowland, a heroin addict who had previously introduced Bessent to several heroin dealers, drove to the home of petitioner's sister, Evangelina Lopez-Hernandez, in El Paso, Texas (Tr. 68–71).[2] There, Rowland met petitioner; however, petitioner refused to meet with Bessent, fearing he was a policeman. On this occasion, petitioner sold five grams of heroin to Rowland, who, in turn, sold them to Bessent for $150 (Tr. 73–75).

Bessent next saw petitioner on August 20, 1969, again in the company of Rowland and at the home of petitioner's sister. Petitioner, who no longer seemed reluctant to deal with Bessent directly, agreed to sell the undercover agent two ounces of heroin (Tr. 82). The two men, accompanied by Rowland, walked into a bedroom where Bessent counted out $1,100 and placed it on a nightstand. Petitioner drew three jars of heroin from a drawer in the nightstand and began measuring out two ounces. As he was doing this, he called his sister, who immediately entered the room and removed the money (Tr. 83–87). Petitioner explained that he wanted the money hidden because he had once been robbed by a buyer as he was taking out the heroin (Tr. 125). He also stated that he had the

[2] "Tr." refers to the two-volume trial transcript, which we are lodging with the Clerk of this Court.

heroin brought across the river from Juarez, Mexico. After receiving the heroin, wrapped in plastic, Bessent informed petitioner that he would be returning to El Paso in about two weeks and wanted to buy 20 or 30 ounces of the narcotic at that time. Petitioner agreed to supply it (Tr. 89–90).

Bessent telephoned petitioner on September 11, 1969, and petitioner assured him that a good supply of heroin had arrived. The following day, Bessent drove to El Paso where, having arranged a surveillance by agents of the Bureau of Customs, he met petitioner in a bar. Bessent agreed to buy 15 ounces of heroin at $550 per ounce. Petitioner and the undercover agent then drove to an alley behind a shopping center (Tr. 94–97), and Bessent asked to see the heroin. Petitioner reached under the steering wheel of his car and pulled out a brown paper sack which he handed to Bessent. After inspecting it to assure himself that the bag contained heroin, Bessent signaled the surveillance team and placed petitioner under arrest (Tr. 98–99).

At trial, petitioner took the stand and admitted to making the narcotic sales charged in the indictment. He testified, however, that he had been coerced into dealing in narcotics by three men from Juarez, Mexico, who had threatened not only petitioner's life but the lives of his wife, mother and children if he did not cooperate (Tr. 309–315, 324–325, 335). He stated further that, in April, 1969, he had been shot two or three times in the back by these men, and that then, his assailants, holding a revolver to his head, had warned

him to remain silent (Tr. 317–320). Acknowledging that, since his arrest on September 12, 1969, he had neither seen nor heard from any of the three men, petitioner testified that he was nevertheless still frightened of them, especially because he was now in court (Tr. 347, 387–388).

On cross-examination, petitioner stated that, when he was arrested, there were at least seven law-enforcement officers around his car (Tr. 348–349). The prosecution then asked (Tr. 349):

> Q. All right, and you didn't tell a single one of those men this story that you have told from the witness stand this morning, did you?
>
> A. At that moment, I don't think so.
>
> Q. In fact, you never have told that story to any officer, that you told on the stand today?
>
> A. No.

Later, petitioner repeated that, prior to testifying in court, he had never told police of being pressured, despite ample opportunity to do so (Tr. 382–383). No objection to the interrogation was made at trial. In closing argument, the prosecutor referred to the fact that, at the time of his arrest, petitioner did not tell anyone that his family might be in danger (Tr. 441, 484).

Petitioner contends here, as he did below, that the prosecutor's cross-examination and comments on closing argument concerning petitioner's failure to notify authorities of the threats on his life and the alleged danger to his family violated his privilege against self-incrimination and his right to counsel, contrary to

Miranda v. *Arizona*, 384 U.S. 436. He argues that the court below erred in characterizing his silence in this regard as an act inconsistent with his asserted defense and therefore admissible under *Harris* v. *New York*, 401 U.S. 222.

It is clear that the government did not rely on petitioner's silence after arrest as carrying any implication of guilt; it was seeking to impeach petitioner's claimed justification for dealing in narcotics by showing an inconsistent act. His failure to seek police protection for his wife, mother and children at the time of his arrest, and thereafter, plainly casts doubt on the credibility of his testimony that he engaged in the sale of heroin to protect the lives of his family. This is especially true in light of petitioner's testimony that he had "never ceased to fear" the men who he claimed had threatened him (Tr. 387), and indeed indicated that he feared them even more "[n]ow that I am here in court" (Tr. 338). It was therefore not improper for the court below to rule that, once petitioner took the stand, not merely to deny his guilt, but to raise the affirmative defense of coercion, the prosecution could, under *Harris* v. *New York*, 401 U.S. 222, attempt to impeach his credibility by showing that petitioner had acted in a manner inconsistent with that defense.[3] Cf.

[3] Petitioner contends that the decision of the court below conflicts with decisions of other courts of appeals (Pet. 9–10). Most of the cases cited by petitioner, however, deal with evidence of silence at the time of arrest, often in the face of police interrogation, as an impermissible inference of guilt. They do not involve evidence of silence going to the question of a defendant's credibility on the witness stand, and introduced on

Brown v. *United States*, 356 U.S. 148, at 154–156; *Grunewald* v. *United States*, 353 U.S. 391; *Walder* v. *United States*, 347 U.S. 62. This is indeed an easier case than *Harris*, since the failure to seek protection for one's family would, in any ordinary sense, be considered collateral to the question of guilt for the offense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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cross-examination solely for the purpose of showing an inconsistency with the defendant's asserted defense, as revealed by his own testimony. All of the cases on which petitioner relies were decided prior to this Court's decision in *Harris*.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-62

RAMIRO RUBEN RAMIREZ, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING OF RAMIRO RUBEN RAMIREZ

JOSEPH A. CALAMIA
JOHN L. FASHING
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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1971

No. 71-62

RAMIRO RUBEN RAMIREZ, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered October 12, 1971, and (2) granting this petition. As grounds for this motion, petitioner states the following:

1. The "Rule of Four" should not be followed in the case at bar.

The rule that four votes are necessary to grant petition for certiorari should not be followed where only seven Justices are on the Court to participate in the consideration of a petition. A rare occasion has caused petitioner's petition for certiorari to be denied by five Justices while Mr. Justice Douglas and Mr.

Justice Brennan were of the opinion that certiorari should be granted. Due process of law should require this Court to grant the petition for certiorari under these circumstances as petitioner did not have an opportunity to present his constitutional grounds to a full court. In the alternative, Ramirez' petition for certiorari should be reconsidered when this Court is at full strength again.

2. There are conflicts between Courts of Appeals on the issue presented herein.

The affirmance below (441 F. 2d 950) by the Fifth Circuit held that a defendant can be constitutionally cross-examined at his trial in regard to his failure to give an exculpatory statement to law enforcement officers after his arrest. This decision is in direct conflict with the case of UNITED STATES v NOLAN, 10 Cir. 1969, 416 F. 2d 588, not cited in petitioner's petition for certiorari, where it was held plain error to comment in closing argument that Nolan gave no exculpatory statement to officers until he testified at his trial. The Supreme Court of Ohio in STATE v STEPHENS, 1970 263 N.E. 2d 773, set out the same issue and held as follows:

> " When a defendant testifies in his own behalf are the protections against self-incrimination waived? May the prosecutor then comment upon the defendant's silence during any stage of the accusatorial process?

> * * * The right of silence, while singular in the constitutional grant, may be plural in application. That right, once invoked by an accused under accusation is not waived by reason of defendant testifying at the trial. "

The rule that where there are decisions in conflict between courts of appeal in regards to important constitutional questions, then certiorari should be granted, should be followed herein. See GILLISON v UNITED STATES, D.C.. 1968, 399 F.2d 586; FOWLE v UNITED STATES, 9 Cir. 1969, 410 F.2d 48; UNITED STATES v BRENSON, 6 Cir. 1969, 411 F.2d 1057, for cases in conflict with the Fifth Circuit opinion herein.

The instant case is of great importance to all lawyers, for must they now advise their clients that silence after arrest can be used against them by way of cross-examination? Should law enforcement officers now warn all accused of crime that their silence after arrest can be used to impeach them by way of cross-examination at a trial in the event they make an exculpatory statement for the first time at such trial? These striking questions merit review by this Court. The case at bar can only cause mass confusion in regard to Fifth Amendment rights to remain silent and the right of a defendant to testify in his own behalf. The fair administration of justice calls for this Court to tell lawyers now the correct rule of law in regards to the issue presented herein.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

Joseph A. Calamia
JOSEPH A. CALAMIA

John L. Fashing
JOHN L. FASHING

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608 Southwest National
Bank Building, El Paso,
Texas 79901

CERTIFICATE OF SERVICE

I, John L. Fashing, one of the attorneys for the petitioner Ramiro Ruben Ramirez, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 2nd day of November, 1971, I served three copies of the foregoing Petition for Rehearing each, on the following:

1. On Mr. Ralph Harris, Assistant U.S. Attorney for the Western District of Texas

El Paso Division, by mailing him three copies of the same at his offices, Federal Courthouse Building, El Paso, Texas 79901.

2. On the United States by mailing three copies thereof in a duly addressed envelope with airmail postage prepaid to the Honorable Erwin Griswold, United States Solicitor General, United States Department of Justice, Washington, D. C.

John L. Fashing

John L. Fashing